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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-768

BILLY BOB WILLIAMS, et ux

v.

DR. DWIGHT DILL, et al

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR DR. DWIGHT DILL, ET AL, IN OPPOSITION

SMEAD, ROBERTS, HARBOUR, SMITH, HARRIS & FRENCH,
P. O. Drawer 2072,
Longview, Texas 75601,
Attorneys at Law.

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OPINIONS BELOW

The district court did not render an opinion. The opinion of the court of appeals is not yet reported but is attached hereto as Exhibit "A" and the order overruling the motion for rehearing is attached hereto as Exhibit "B".

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1971. A petition for rehearing was denied on

November 16, 1971. The petition for a writ of certiorari was filed on December 10, 1971. The jurisdiction of this court is invoked under 28 U.S.C. 1331, 28 U.S.C. 1332, 28 U.S.C. 1343, 28 U.S.C. 1443, 28 U.S.C. 1446 and 28 U.S.C. 1985, none of which sections of the judicial code are applicable which will be demonstrated later.

QUESTIONS PRESENTED

1. Did the Appellants comply with the requirements of 28 U.S.C. 1446 in filing their petition for removal from the courts of the State of Texas to the United States District Court for the Northern District of Texas in the Dallas Division thereof?

2. Did the trial court correctly remand this cause to the courts of the State of Texas?

3. Have any constitutional rights of the Appellants been violated?

4. Did the Appellants attempt to remove this cause of action to the wrong United States District Court?

STATEMENT

The Respondents do not agree in any particular with the statement of the case as presented by the Petitioners in their application for writ of certiorari and state that such statement does not adequately apprise the court of the conflicts between the Petitioners and Respondents.

This matter before the court involves an ordinary trespass to try title action in which the Petitioners claim title to a certain tract of land in Wood County, Texas, and Respon-

dents claim the superior title to the same tract of land. After appropriate pleadings were filed and without any attempt at removal, the title to the tract of land involved was tried before a jury in Wood County, Texas, and based upon adverse findings of the jury a judgment was entered by the trial court awarding superior title to such tract of land to the Respondents herein. The entire Judgment of the State District Court is set out in the addendum to Petitioner's application for Writ of Certiorari and shows on its face that all the constitutional rights of the Petitioners were protected. No attempt at removal was made to the Federal Courts at any time before judgment was rendered. An attempt was made to remove this case to Federal Court after the Petitioners in this Cause had appealed to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas.

An inspection of the initial pleading filed in the United States District Court for the Northern District of Texas, Dallas Division, will reveal it was given No. CA3-4811 and was styled Petition for Removal to United States District Court "That my Constitutional Rights have been Denied Me, Under the Eleventh and Fourteenth Amendment of the United States Constitution." An inspection of the body of such instrument will reveal that although no number is ever referred to of State Court litigation that the Appellants-Petitioners complain of certain action had by the District Court of Wood County, Texas, in trying a cause of action pending in that Court. A further inspection of the initial pleading filed by the Appellants will not reveal the nature of any of the procedural aspects of her litigation, nor does it

reveal in any manner whatsoever how the Appellants have been injured in any manner much less in a manner that would have violated their constitutional rights.

Before this present suit began in the United States District Court these same Appellants-Petitioners and Defendants-Respondents had had a litigation in the District Court of Wood County, Texas, in the form of a Trespass to Try Title action. The chronological events of the State Court litigation can be secured by referring to the affidavit of Henry H. Harbour which was attached to the Motion to Remand, filed in the United States District Court by the Defendants, Dr. Dwight Dill and Robert P. Dill. Such affidavit is the only place in this record which will reveal the nature of the problems that existed by and between the parties to this appeal.

This record reveals that an ordinary Trespass to Try Title Action was filed in Cause No. 12,763, in the District Court of Wood County, Texas, and in such Cause the Appellees-Respondents here were the Plaintiffs and the Appellants-Petitioners were the Defendants. An answer was entered to such cause of action and no Petition for Removal was filed to the Federal Courts. This Answer was filed December 17, 1968. Thereafter, the same Appellants-Petitioners filed a suit, although not labeled a Trespass to Try Title action, apparently sought to recover the same lands made the subject of Cause of Action No. 12,763 and this cause of action filed by the Appellants-Petitioner had No. 13,020 and was filed February 20, 1970. The issue was joined in Cause No. 13,020 by the Defendants, Dill, filing an Answer to such

cause of action. Thereafter, upon motion being duly made on October 13, 1970, the District Court of Wood County, Texas, consolidated Cause of Action No. 12,763 and Cause of Action No. 13,020. On such date the First Amended Original Petition was filed by the Dills, the Appellees-Respondents here, and no Petition for Removal was made. On November 23, 1970, with the Appellants-Petitioners then present the Consolidated Cause proceeded to trial before a jury and was tried from day to day until November 25, 1970, when the jury returned its verdict in favor of the Appellees-Respondents. On December 31, 1970 the judgment was entered in No. 12,763 giving title and possession to the tract of land involved in such law suit to the Appellees-Respondents, Emory Dwight Dill and Robert P. Dill.

From that Judgment the Appellants-Petitioners in this cause were the Appellants in the Court of Appeals of the Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas, under Cause No. 8040, styled Billy Bob Williams, et ux, Appellants, v. Emory Dwight Dill, et al, Appellees. The case had been set for submission and oral argument on June 22, 1971, but prior to that date on May 25, 1971, the Appellants-Petitioners filed the present Petition for Removal to the United States District Court. Although it has not been published in the Southwest Reports of West Publishing Company the Court of Civil Appeals has affirmed the State District Court Judgment awarding possession of the land to the Dills, and the decision of the Court of Civil Appeals has been affirmed by the Supreme Court of Texas by its refusing to grant a Writ of Error.

After the original filing with the United States District Court on May 25, 1971, the Appellants-Petitioners filed three other motions with one styled Petition for Removal from the Court of Civil Appeals, Texarkana, Texas, on June 11, 1971; Motion re Petition for Removal on June 11, 1971 and a Motion to Remove Billy Bob Williams, et ux, v. Dr. Dwight Dill, et al, "If this case was not removable, it is a case which has become removable, under Title 28 Section 1443."

Upon those three instruments being filed they completed the pleadings of the respective parties and on June 29, 1971, the United States District Court, Honorable Joe E. Estes presiding, entered his Order remanding the action to the Court of Civil Appeals for the Sixth Supreme Judicial District at Texarkana, Texas. Judge Estes' Order was affirmed by the 5th Circuit. This appeal resulted from such affirmation.

The Respondents further state that the statement of the case filed by the Petitioners is totally incorrect and is not supported by any records before the Court in stating that one State Senator Ralph M. Hall is claiming the land involved through fraud. State Senator Ralph Hall was never a party nor does he have, according to the record, any ownership in the land involved. Furthermore, the Petitioners have treated the rules of evidence rather loosely in attaching to their application for writ of certiorari several maps which are not in evidence before the court in this particular cause nor were they before the Circuit Court of Appeals or the Trial Court. However, none of such maps

show that any of the Petitioners constitutional rights have been violated.

ARGUMENT

The decision below is correct. There is no conflict of decisions or other occasion for further review.

At the outset it must be remembered that this is not a cause of action that was originally filed in the Federal Court. On the other hand, it is a Petition for Removal that is governed by the requirements of 28 U.S.C.A. 1446 and none of such requirements were met. In fact, instead of the requirements being met during all of the time that the causes of action between the parties in this cause was pending in the District Court of Wood County, Texas, no effort was ever made in any manner whatsoever to remove such causes to the Federal Court. On the other hand, many, many instruments were filed in that cause by the Appellants-Petitioners in this cause. They actively participated in the trial of the cause and actively participated in perfecting an appeal to the Court of Appeals for the Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas. For some reason, after perfecting that appeal and before the Court of Civil Appeals had an opportunity to even hear an argument in such cause this present Petition for Removal was filed. The Petition for Removal was defective in that it was not filed within thirty days after the receipt of the copy of the pleadings made upon the Defendant nor was a copy of the pleadings made upon the Defendant nor was a copy of all the processes and pleadings that had been served

upon the Appellants-Petitioners attached to the Petition for Removal.

The thirty day limit for the filing of the Petition for Removal is mandatory and upon failure to comply a case must be remanded. See *Adams v. Western Steel Building, Inc.*, (D.C. COL.) 1969, 296 F.S. 759; *Maybruck v. Haim*, (D.C. N.Y. 1968), 290 F.S. 721 and *Robinson v. LaChance*, (D.C. N.C. 1962) 209 F.S. 845.

Rule 7 of the Federal Rules of Appellate Procedure provide that an Appellant unless he is exempted by law or having filed his supersedeas bond or other undertaking which includes security for the payment of cost on appeal, shall file a bond for cost with the notice of appeal. From the record furnished to the Appellees-Respondents it does not appear that such appeal bond was posted although some type of cost bond was posted. 28 U.S.C.A. 1446 provides that the petition for removal must be a verified petition and contain a short and plain statement of the facts which entitle him or them to removal. An inspection of all of the pleadings filed on behalf of the Appellants-Petitioners will reveal that there is a total lack of absence of any allegations which would show that this is a proper case that can be removed to the Federal Courts. If a constitutional question were involved, it would not be the subject of a Petition for Removal but would be an entirely different proceedings.

Also, it must be considered that the Appellants-Petitioners have not exhausted their remedies in the State Courts in appealing from an adverse decision of a State District Court judgment in which they had actively participated.

(The Federal Courts do not favor and have never held that jurisdiction can be maintained in the Federal Courts and the State Courts at the same time. The Appellants-Respondents are invoking the jurisdiction of the Court and the Supreme Court of Texas at the same time. This, the law does not permit.)

Also, it must be borne in mind that the Court of Civil Appeals in Texas is an Intermediate Court and that there is a Texas Supreme Court and if the Appellants-Petitioners were dissatisfied with the ruling (which had not been made at the time of the filing of this Petition for Removal), they had, upon following the applicable rules of Civil Procedure, the right to appeal to the Texas Supreme Court and to have the decision of the State District Court and the Court of Civil Appeals reviewed. Since the Petition for Removal does not show any reason which would make it a case removable to the Federal Courts then in the absence of such the United States District Court correctly held that the case should be remanded to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas where the case was then pending. See 28 U.S.C.A. 1446, *Couch v. White Motor Company*, (D.C. Mo. 1968) 290 F.S. 697; In Re Heisig, (D.C. Ill. 1959) 178 F.S. 270; *F and L Drug Corporation v. American Cent. Insurance*, (D.C. Conn. 1961) 200 F.S. 718; and *Yarbrough v. Blake*, (D.C. Ark. 1962) 212 F.S. 133.

As additional reason why the decision of the United States District Court should be affirmed, the Appellees-Respondents submit that even had this been a case for removal the same

would have been removable to the United States District Court for the Eastern District of Texas, Texarkana Division and not the United States District Court for the Northern District of Texas, Dallas Division. See *General Investment Company of the Lake Shore and M. R. Company*, 260 U.S. 261 — 67 L. Ed. 244; — 43 Sup. Ct. Rep. 106; and *Buffington v. Vulcan Furniture Mfg. Corp.*, (D.C. Ark. 1950) 84 F.S. 13.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals affirming the judgment of the United States District Court for the Northern District of Texas is clearly correct in remanding this cause to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas.

The Petitioners in this cause simply do not want to accept the fact that they were accorded a full and complete trial before a jury of lawful citizens of the United States in the District Court of Wood County, Texas, in which cause they appeared and fully litigated their rights before such jury.

An inspection of the records before the District Court and Circuit Court of Appeals will reveal that the Petitioners were accorded all of the constitutional guarantees given to them by the Constitution of the United States. They were unsuccessful in prosecuting their cause of action in the Courts of the State of Texas, and now are attempting to relitigate the same questions that have been determined adversely to them in the courts of the State of Texas.

There is no place in the application for Writ of certiorari or in the record before this court which would show that any rights of any nature have ever been denied to the Respondents and therefore the application for writ of certiorari should be denied.

Respectfully submitted,

SMEAD, ROBERTS, HARBOUR, SMITH, HARRIS & FRENCH,

By Jerry S. Harris
Jerry S. Harris
P. O. Drawer 2072,
Longview, Texas 75601,
Attorneys at Law.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief of Dr. Dwight Dill, et al, in opposition to the application for writ of certiorari has been made on opposing counsel by mailing four copies thereof on this 3 day of ~~December~~ JANUARY, 1972, in an envelope, with postage prepaid, properly addressed to them as follows:

Rosemary Williams
1608 Gardenside
Dallas, Texas 75217

By Jerry S. Harris
Jerry S. Harris

EXHIBIT "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2448
Summary Calendar*

Billy Bob Williams, et ux,
Plaintiffs-Appellants,

versus

Dr. Dwight Dill, et al,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(October 20, 1971)

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F. 2d 409.

[1] See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F. 2d 966.

EXHIBIT "B"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2448

Billy Bob Williams, et ux,
Plaintiffs-Appellants,

versus

Dr. Dwight Dill, et al,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Oct. 20, 1971, 5 Cir., 1971, ... F2d .....).

(November 16, 1971)

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.